STATE OF MICHIGAN

COURT OF APPEALS

LARRY RICKMAN and SHARON RICKMAN, Plaintiffs-Appellants, v NURSE MARY J. MALONE, NURSE KARI A. STIMSON, and PORT HURON HOSPITAL, Defendants-Appellees.	UNPUBLISHED April 24, 2014 No. 313661 St. Clair Circuit Court LC No. 10-003028-NH

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant, Port Huron Hospital (hospital), in this medical malpractice action.[1] We affirm.

On January 11, 2009, plaintiff, Larry Rickman, was admitted to the hospital after suffering a stroke.[2] The left side of his body was impaired. Upon admission to the hospital, Rickman was assessed to be at high risk for falls. A physical therapist evaluation performed the next day also noted safety concerns with regard to ambulation. However, Registered Nurse Mary Malone (Nurse Malone) completed a fall risk assessment on the same day and indicated that Rickman was at low risk for falls. On January 13, 2009, Rickman fell and sustained injuries.

On December 8, 2010, this lawsuit was filed. In count I, plaintiffs set forth a medical malpractice claim premised generally on the failure to provide appropriate and necessary care to Rickman considering his condition. Plaintiffs alleged that the hospital was vicariously liable for the failure of its personnel to implement necessary precautions to prevent falls and to employ appropriate devices to prevent falls. In count II, plaintiffs set forth a general negligence claim which was ultimately dismissed by stipulation and is not at issue in this appeal.

[1] On March 25, 2011, defendants Mary J. Malone and Kari A. Stimson were dismissed from the lawsuit by stipulated order.

[2] Plaintiff Larry Rickman will be referred to as "Rickman" in this opinion for the sake of clarity because his wife's loss of consortium claim is derivative.

On June 22, 2012, a stipulated order was entered which stated, in part: "Plaintiffs will utilize Rosemary Kalair, R.N. as their only retained standard of care expert and that Plaintiffs will utilize Howard D. Dubin, D.O. as their only retained causation/damages expert."

On September 28, 2012, the hospital filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The hospital argued that plaintiffs' medical malpractice claim should be dismissed because (1) plaintiffs' sole standard of care expert, Nurse Kalair, was not qualified to provide testimony, (2) plaintiffs' theory that a bed alarm would have prevented Rickman's fall was pure speculation and conjecture, and (3) expert testimony failed to establish proximate causation between the alleged breach of the standard of care and Rickman's claimed injuries. The hospital argued that Nurse Kalair testified that she worked in an outpatient rehabilitation facility, had not worked as an in-patient nurse since 1994, did not utilize bed alarms in her practice at the rehabilitation facility, and had not researched information regarding falls and the use of bed alarms; thus, she was not qualified to render expert witness testimony in this case. Further, the hospital noted that Rickman's injuries occurred in a manner completely different than the manner alleged in plaintiffs' complaint. That is, in their complaint, plaintiffs alleged that Rickman got out of bed without assistance and fell on a protruding heating vent. However, Rickman testified in his deposition that he was catapulted off the edge of his bed when a nurse slipped on ice that had spilled next to his bed. In either case, however, a bed alarm would not have prevented Rickman from falling; thus, such speculative testimony should not be permitted. Moreover, plaintiffs' causation expert, Dr. Dubin, did not correlate any alleged breach of the standard of care to the cause of the fall. And he admitted that, even when a bed alarm is utilized, a patient can fall before anyone can respond to the alarm; thus, plaintiffs failed to establish that a bed alarm would have prevented Rickman's fall. Accordingly, the hospital argued, plaintiffs' lawsuit should be dismissed.

Plaintiffs responded to the hospital's motion, arguing that Nurse Kalair was a qualified standard of care expert. Further, because Rickman was at a high risk for falls, a bed alarm should have been used. When Rickman attempted to get out of bed, the alarm would have sounded and more probably than not someone would have responded before he fell because his room was located close to the nursing station. Accordingly, plaintiffs argued, the hospital's motion for summary disposition should be denied.

On November 6, 2012, plaintiffs filed a motion requesting permission to file an amended expert witness list because their expert, Nurse Kalair, had been diagnosed with a serious illness and was unable to continue to serve as plaintiffs' standard of care expert witness. Plaintiffs attached Nurse Kalair's affidavit to their motion in support of their request. The hospital opposed the motion, arguing that its motion for summary disposition was pending and should result in the dismissal of the action.

On November 13, 2012, oral arguments were held on the pending motions. The trial court questioned plaintiffs' counsel as to why he believed a person with Nurse Kalair's qualifications was qualified to give expert testimony about the standard of care in this case and counsel responded that "[a] nurse is qualified to render expert testimony against another nurse." Counsel further argued that Nurse Kalair worked with cardiac patients and that fifteen years ago she worked with bed alarms. Counsel argued that Nurse Kalair had been a nurse for 33 years and worked for over 20 years "doing exactly the same thing that [Nurse Malone] does." Nurse

Malone testified that on the day of his fall, Rickman was in a telemetry unit and she was providing general, not specialized, care to him. The hospital's counsel argued that Nurse Kalair's work at an outpatient facility was not similar to the hospital setting at issue in this case and her experience with bed alarms was several years ago.

The trial court agreed with the hospital's argument, holding that Nurse Kalair was not qualified to give an expert opinion as to the actions of Nurse Malone in this case and cited to MCL 600.2169(1)(b)(i), (2), and (3). The trial court noted that Nurse Kalair had not worked in a hospital setting for 15 years and did not work with bed alarms. Thus, the court held that plaintiffs were not able to establish that the standard of care was breached in this case and summary disposition was proper under MCR 2.116(C)(10). Further, the court held that the opinion rendered by Nurse Kalair was speculative; thus, summary disposition under the same subrule was also appropriate. In light of the court's resolution of the motion for summary disposition, plaintiffs' motion to file an amended expert witness list was denied. On November 26, 2012, the trial court entered orders granting the hospital's motion for summary disposition and denying plaintiffs' motion to amend their expert witness list. This appeal followed.

Plaintiffs argue that the trial court abused its discretion in finding that Nurse Kalair was not a qualified standard of care expert and, thus, improperly granted summary disposition in favor of the hospital. We disagree.

The qualification of a witness as an expert, and the admissibility of such testimony, are within the trial court's discretion and will not be reversed absent an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Id.* A close evidentiary question ordinarily is not an abuse of discretion, but an erroneous application of the law is an abuse of discretion. *Gay v Select Specialty Hosp*, 295 Mich App 284, 292; 813 NW2d 354 (2012); *Lewis v LeGrow*, 258 Mich App 175, 200, 214; 670 NW2d 675 (2003). Further, issues of statutory interpretation are reviewed de novo. *Woodard*, 476 Mich at 557. Likewise, we review de novo a trial court's decision on a motion for summary disposition. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). A motion under MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Four elements must be established in a medical malpractice claim: (1) the appropriate standard of care, (2) a breach of the standard of care, (3) injury, and (4) that the injury was the proximate result of the breach of the applicable standard of care. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). A hospital may be held liable in a medical malpractice action on a vicarious liability theory for a breach of the standard of care by one of its nurses. See *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11, 22; 651 NW2d 356 (2002). Thus, here, to establish their claim related to the nursing care that Rickman received, plaintiffs had to present expert testimony on the appropriate standard of care. MCL 600.2169 requires that the proposed expert meet certain requirements and provides in pertinent part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is

> licensed as a health professional in this state or another state and meets the following criteria:
>
> * * *
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed . . . .
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> * * *
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> (2) In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
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> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness' testimony.
>
> (3) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

In this case, it is undisputed that Nurse Kalair, like Nurse Malone, is a licensed registered nurse and had been a registered nurse for 35 years. From 2006 to the time of her deposition, Nurse Kalair worked in an outpatient cardiac rehabilitation facility affiliated with St. John Hospital. She had last worked in a hospital setting providing in-patient care from 1977 to 1994. Nurse Kalair testified that from January 2008 to January 2009, the year prior to Rickman's fall, she worked as a registered nurse and provided direct patient care three of the five days a week that she worked. Although she did fall risk assessments on patients, she did not make decisions regarding the use of bed alarms because it was an out-patient facility. But, she testified, when she did provide in-patient care years ago, she made decisions regarding the use of bed alarms.

The hospital argued in the trial court, and argues here on appeal, that Nurse Kalair was not qualified to offer expert witness testimony because she had not worked at an in-patient hospital for several years and had not been required to make any decisions regarding the use of a bed alarm in several years. The hospital claims that "if a proffered 'expert' is going to give testimony as to the standard of care in this unique environment [, i.e., a hospital], then at minimum, that 'expert' should have up-to-date relevant knowledge about that environment." However, MCL 600.2169(1)(b)(i) requires that, during the year preceding the occurrence at issue, the proposed expert devoted a majority of her professional time to the "active clinical practice of the same health profession." The statute does not require that the "active clinical

practice" be in the same clinical environment or be the same "clinical practice." MCL 600.2169(1)(b)(i). We may not interject such a requirement into an unambiguous statute. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

But the trial court also held that Nurse Kalair was not qualified to offer expert testimony under MCL 600.2169(2) and (3). Subsection (2) sets forth the minimum factors that the court must consider with regard to the qualifications of a proposed expert witness and subsection (3) provides that the trial court may "disqualify an expert witness on grounds other than the qualifications set forth in this section." It appears that the trial court considered the fact that Nurse Kalair had not worked with bed alarms for 15 years, although she opined that the use of a bed alarm would have prevented Rickman's fall. This lack of relevant and recent professional experience, education, and training with regard to the use of bed alarms were proper factors for the trial court to consider in determining whether Nurse Kalair was qualified to offer expert testimony on the appropriateness of a bed alarm in this matter. Moreover, the facts and circumstances surrounding Rickman's fall were unclear. Plaintiffs' complaint alleged that Rickman fell while trying to get out of bed unassisted, but Rickman testified that he was catapulted from the edge of his bed when a nurse slipped on ice that had spilled next to his bed. But even if Rickman fell while attempting to get out of bed without assistance, we agree with the trial court that it is speculative to conclude that hospital staff would have heard and responded to the bed alarm in time to prevent Rickman's fall. Consequently, the trial court properly concluded that Nurse Kalair's proposed expert testimony that a bed alarm would have prevented Rickman's fall lacked the requisite relevancy. In light of these considerations, we conclude that the trial court did not abuse its discretion in finding that Nurse Kalair was not a qualified standard of care expert. See *Woodard*, 476 Mich at 557. Because plaintiffs' proffered standard of care expert was not qualified to offer expert testimony on the standard of care or its breach in this matter, the hospital's motion for summary disposition was properly granted. Further, for the reasons discussed above, the trial court did not abuse its discretion when it denied plaintiffs' motion to allow a substitute expert to support their claim.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh